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REGULATING FEDERAL PROSECUTORS: WHY McDADE SHOULD BE REPEALED

Paula J. Casey*

INTRODUCTION

The McDade Amendment,[1] a federal law subjecting government attorneys to state attorney discipline rules, became effective in April 1999. Critics of the legislation predicted that the legislation would create serious problems in law enforcement.[2] Within a matter of months, those predictions proved true.

On August 17, 2000, the Oregon Supreme Court announced that Oregon Disciplinary Rule 1-102(A)(3), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation,"[3] provides no exception for government lawyers supervising covert criminal or civil investigations.[4] The result was immediate and dramatic as local, state, and federal government attorneys ceased participation in undercover law enforcement activities.[5] The investigation of a worldwide narcotics conspiracy involving international money laundering languished in the United States Attorney's Office in

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1. 28 U.S.C. § 530B (2000).

> Ethical standards for attorneys for the Government. (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

Id.

2. *Regulation of Bar: Congress Enacts Statute That Subjects Federal Prosecutors to State Laws and Rules*, 14 A.B.A: THE BUREAU OF NAT'L AFF. INC., LAWS. MANUAL ON PROF. CONDUCT 498, 499 (1998) [hereinafter ABA/BNA LAWS. MANUAL].

3. Oregon has not adopted the Model Rules of Professional Conduct. *See infra* note 27. However, the Model Code of Professional Responsibility DR 1-102(A)(3) is identical to Model Rule 8.4(c). Both rules state that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The rule was first adopted in 1970 as DR 1-102(A)(4) but became DR 1-102(A)(3) on June 1, 1986. The language did not change.

4. *In re* Gatti, 8 P.3d 966, 976 (Or. 2000).

5. Mark Larabee, *Undercover Police Work in Jeopardy*, THE OREGONIAN, SUNRISE EDITION, Oct. 9, 2000, at A01.

Oregon for months.[6] Several *qui tam* investigations were placed on hold.[7]

Attempts to resolve this dilemma through amendment of the disciplinary rules,[8] federal litigation,[9] state legislation,[10] and federal legislation[11] failed. Eighteen months lapsed before the Oregon Supreme Court adopted an exception to DR 1-102(A)(3) to permit government attorneys to resume participation in undercover law enforcement activities.[12]

The Oregon experience is not necessarily the final chapter. Because Congress ceded disciplinary authority of federal attorneys to the states,[13] Department of Justice and other federal attorneys may face similar disciplinary challenges in other jurisdictions over the same issue or other issues. The potential cost to the public could be significant in terms of wasted resources and lost law enforcement opportunities.

Part I of this article will review the history of attorney discipline in the United States, including the origins of DR 1-102(A)(4).[14] Part II will then review cases and events that led to the passage of the federal law that subjects federal prosecutors to federal district court and state ethical rules. Part III will explore the Oregon Supreme Court decision in *In re Gatti* and the consequences of the court's reasoning. Next, Part IV will consider the history and importance of

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6. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 15, United States v. Or. State Bar, No. CV01-6168-HO (D. Or. May 23, 2001); Declaration of United States Attorney Michael W. Mosman in Support of the Plaintiff's Motion for Summary Judgment at ¶ 11, United States v. Or. State Bar, No. CV01-6168-HO (D. Or. May 23, 2001).

7. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 16-17, *Or. State Bar*, No. CV01-6168-HO; Declaration of United States Attorney Michael W. Mosman in Support of the Plaintiff's Motion for Summary Judgment at 7, *Or. State Bar*, No. CV01-6168-HO.

8. *See infra* note 80.

9. *See United States v. Or. State Bar*, No. CV01-6168-HO, (D. Or. May 23, 2001).

10. *See infra* note 94.

11. *See infra* note 95.

12. The amendment to the rule is not limited to government attorneys. *See In the Matter of an Amendment to DR 1-202 of the Disciplinary Rules of the Oregon Code of Professional Responsibility*, Oregon Supreme Court, Order No. 02-028, *at* http://159.121.112.45/RULE50.htm (Jan. 31, 2002) [hereinafter *Matter of an Amendment*].

13. 28 U.S.C. § 530B (2000).

14. DR 1-102(A)(4) is identical, in relevant part, to Model Rule of Professional Responsibility 8.4. AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROF'L CONDUCT 592 (4th ed. 1999) [hereinafter ANN. MODEL RULES].

undercover operations, particularly to the enforcement of criminal law. Finally, the article will analyze the resolution of the problem in Oregon, provide justifications for exceptions to the general rule for federal attorneys, and offer an argument for a federal solution.

I. ATTORNEY DISCIPLINE IN THE UNITED STATES

Until the Twentieth Century, courts regulated the conduct of lawyers in the United States.[15] In the late nineteenth century, several bar associations developed advisory codes of conduct. The 1887 Code of Ethics of the Alabama State Bar Association was the model for the Canons of Professional Ethics of 1908, the first ethics code proposed by the American Bar Association.[16] The 1908 Canons, which originally consisted of thirty-two flowery statements that commanded lawyers to deport themselves as gentlemen, were adopted by many bar associations and enforced in disciplinary proceedings in some jurisdictions.[17]

The Golden Rule echoes throughout the 1908 Canons. Many of the canons address the need for lawyers to be candid and fair in every aspect of their professional lives.[18] As one author explained in his treatise on legal ethics:

> There are a number of canons, partially interrelated, which deal with the duty of lawyers to be candid and fair with their clients, with other lawyers, with the courts, and in their professional conduct generally. They are, of course, but another aspect of the fact that the law is a service profession and not a business. A lawyer is not only under obligation to refrain from making misrepresentations, but he also is denied the luxury of material

15. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.8 (3d ed. 2001). Courts had exclusive power to grant admission to the bar and the power to regulate lawyer conduct during litigation. Courts also developed common law doctrines for regulating lawyers through direct actions against lawyers by private parties. *Id.*

16. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 53-54 (1986).

17. *Id.* at 55.

18. This issue is addressed in Canons 7, 8, 9, 25, 32, 39, and 41. Canon 22 is titled Candor and Fairness. GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 297-316 (Fred B. Rothman & Co. 1981) (1910).

> concealment generally regarded in the trades as "smart business." There are many situations in which there is a duty upon a lawyer to make full disclosure where there would be no such requirement in a business transaction.[19]

The 1908 Canons contained no language addressing the specific duties and obligations of prosecutors or government attorneys but instead focused on the conduct of attorneys representing private clients in litigation.[20] The lasting significance of the 1908 Canons is that many of the ideas expressed therein were incorporated into later ethics rules that remain in effect today.[21]

Several efforts were made to revise the 1908 Canons,[22] but none met with success until the American Bar Association's Model Code of Professional Responsibility was completed in 1969. Within five years of the completion of the final draft of the Code, all but one state had adopted or taken steps to adopt it.[23] Although much of the content of the 1908 Canons was assimilated into the new Code, new sections were added,[24] and the language was more concisely drafted.

The 1969 Code was attacked from its introduction,[25] and a review commission was appointed to study the problems.[26] The commission produced the 1983 Model Rules of Professional Conduct. With one exception, all jurisdictions have adopted the Model Rules in some

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19. RAYMOND L. WISE, LEGAL ETHICS 287, 288 (2d ed. 1970) (footnote omitted).

20. Contemporaneous literature concerning lawyer ethics is likewise silent as to special duties and obligations of prosecutors and government attorneys. A treatise written by the Dean of the Suffolk School of Law, which claimed to enter "into every question of professional deportment that can ordinarily confront the lawyer," mentions a district attorney only once in the entire volume of almost 300 pages. The reference is to a district attorney who drafted an indictment and later appeared as counsel for the defendant (referencing *People v. Spencer*, 61 Cal. 128 (1882)). ARCHER, *supra* note 18, at 293.

21. HAZARD & HODES, *supra* note 15, § 1.10.

22. MODEL CODE OF PROF'L RESPONSIBILITY at v (Final Draft 1969). Special committees were appointed by the ABA to study revisions to the Canons in 1922, 1933, and 1937. The American Bar Foundation appointed a committee to study revisions in 1954.

23. *See* WOLFRAM, *supra* note 16, at 56.

24. For example, the 1969 Code contains some provisions specifically directed at prosecutors and government lawyers. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1969).

25. The 1969 Code was criticized by lawyers for a variety of reasons but the most serious problem was an antitrust suit by the Department of Justice. *See* WOLFRAM, *supra* note 16, at 60-61.

26. The Kutak Commission, named for its chairman, worked from 1977 until 1983. WOLFRAM, *supra* note 16, at 61.

form.[27]

While the 1908 Canons contained "inspiration and prohibition,"[28] they were not specific in defining violations. For example, Canon 29 urged lawyers to "uphold the honor and to maintain the dignity of the profession."[29] Canon 32 directed lawyers to deserve a reputation for "fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."[30] The 1969 Code expressed the same sentiments, but stated them as a prohibition in Disciplinary Rule 1-102(A)(4): "A lawyer shall not: Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The commission that drafted the Model Rules omitted the language of DR 1-102(A)(4), but the language was reinserted by the ABA House of Delegates when it adopted the Model Rules.[31]

The laudable sentiment that lawyers should be ethical and above-board in dealing with the courts, clients, and the public in general thus became embodied in a rule that was originally targeted at lawyers in private practice. Yet it was a rule that exposed all lawyers, including prosecutors, to disciplinary action. Still, the notion that lawyers should refrain from deceit and misrepresentation was a notion with which few would argue, at least until a state court's interpretation of the rule brought federal law enforcement to a halt.

II. WHO DISCIPLINES FEDERAL PROSECUTORS?

States have historically regulated the conduct of attorneys,[32] but the question of who had ultimate authority to discipline federal prosecutors was the subject of debate, litigation, and legislation for years.[33] Federal prosecutors must be licensed in a state to practice

27. WOLFRAM, *supra* note 16, at 56-57. California never adopted the Model Code or the Model Rules. New York and Oregon adopted the Model Code but not the Model Rules, although both jurisdictions have incorporated parts of the Model Rules. HAZARD & HODES, *supra* note 15, at app. B.

28. WISE, *supra* note 19, at 6.

29. ARCHER, *supra* note 18, at 314.

30. ARCHER, *supra* note 18, at 316.

31. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, PRENTISS HALL LAW AND BUSINESS 569 (Supp. 1988). Disciplinary Rule 1-102(A)(4) and Model Rule 8.4(c) are identical.

32. HAZARD & HODES, *supra* note 15, § 1.17, at 1-28 to 1-29.

33. *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L.

before the federal courts. Most district courts require that attorneys be licensed by the state in which the district court sits.[34] In addition to being subject to the disciplinary authority of the state that issued his license and to the rules of the federal court in which he appears,[35] a federal prosecutor must also comply with the rules promulgated by the Department of Justice.[36]

The lack of a definitive answer to the question of which entity had ultimate control of prosecutors' conduct left prosecutors guessing about appropriate courses of action and vulnerable to attacks if they guessed wrong.[37] Various issues fueled the debate,[38] with the issue of contacts with represented parties[39] being perhaps the most controversial.[40] An opinion from the Second Circuit Court of Appeals concerning the application of the "no contact" rule in criminal investigations prompted Attorney General Richard

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REV. 355, 357-58 (1996).

34. HAZARD & HODES, *supra* note 15, § 1.17.

35. "Courts have long recognized an inherent authority to suspend or disbar lawyers." *In re* Snyder, 472 U.S. 634, 643 (1985) (citing *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378-79 (1867)).

36. The United States Attorney's Manual includes a number of policies concerning the conduct of federal prosecutors. *See, e.g.*, U.S. DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 3-2.171 (1997) (setting forth procedures for recusal of a United States Attorney); *id.* § 9-27.00 (discussing principles of federal prosecution).

37. A represented defendant facing a significant mandatory minimum sentence in a drug prosecution in California attempted to initiate plea bargain discussions with a federal prosecutor and without the knowledge of the defendant's attorney. The prosecutor refused to talk with the defendant until a United States magistrate judge, at the direction of the district judge who was assigned the case, conducted a hearing, found the defendant was voluntarily waiving his right to counsel, and authorized the prosecutor to talk with the defendant. United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), *vacated and remanded*, 989 F.2d 1032 (9th Cir. 1993), *superseded*, 4 F.3d 1455 (9th Cir. 1993). The defense attorney filed a complaint with the disciplinary authority in Arizona, where the prosecutor was licensed to practice. The disciplinary action was dismissed six years after it was filed. For a discussion of the matter, see Little, *supra* note 33, at 371-74. The ABA House of Delegates approved a change to Model Rule of Professional Conduct 4.2 at its meeting in February 2002. The change would permit a prosecutor to communicate with a represented party without the other lawyer's consent if the prosecutor first obtains a court order, which is exactly what the prosecutor in *Lopez* did. Mark Hansen, *Just in Time*, 88 A.B.A. J. 65 (2002).

38. *See* Little, *supra* note 33, at 360.

39. The "no contact" rule is Model Rule of Professional Conduct 4.2, which states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Model Rule 4.2 is identical to Disciplinary Rule 7-104(A)(1) except that Model Rule 4.2 was amended in 1995 to clarify that it was intended to apply to every represented person, not just those who are parties to formal litigation. ANN. MODEL RULES, *supra* note 14, at 397-401.

40. *See* Elizabeth A. Allen, *Federalizing the No-Contact Rule: The Authority of the Attorney General*, 33 AM. CRIM. L. REV. 189 (1995).

Thornburgh to preempt the disciplinary issue by disseminating the Thornburgh Memorandum.[41] Relying on the "authorized by law" exception to the "no contact" rule, Thornburgh declared that "the Department will resist, on supremacy clause grounds, local attempts to curb legitimate federal law enforcement techniques."[42] The memorandum was immediately criticized as an attempt to exempt federal prosecutors from the ethical restrictions that bind other attorneys.[43] Thornburgh defended his memorandum, saying it "was designed to tell prosecutors that the Department would stand by them as long as their actions comported with our lawful and authorized practice, and that the Department was prepared to give advice in each instance where the conflict was perceived."[44]

The Department of Justice attempted to enact a rule that embodied the content of the Thornburgh memorandum.[45] Thornburgh's successor, Attorney General Janet Reno, took a more conciliatory tone in attempting to draft a rule that would promote federal investigative interests and protect federal prosecutors while appeasing

41. Memorandum from Attorney General Richard Thornburgh to all Department of Justice Litigators (June 8, 1989), quoted in *In re* Doe, 801 F. Supp. 478, 486, 490 (D.N.M. 1992) [hereinafter Thornburgh Memo]. The Thornburgh Memo was issued only six months after the decision in *United States v. Hammad*, 846 F.2d 854 (2nd Cir. 1988), *modified*, 858 F.2d 834 (2nd Cir. 1988), *aff'd* 902 F.2d 1062 (2nd Cir. 1990), *cert. denied*, 498 U.S. 871 (1990). In *Hammad*, the Department of Justice defended an Assistant United States Attorney who used an informant to elicit incriminating information from a defendant under investigation. The Assistant provided a bogus grand jury subpoena, which the informant showed to the defendant in a meeting that was videotaped. The defendant moved to suppress the incriminating evidence, claiming that the Assistant had violated the disciplinary rule that prohibits a lawyer from communicating with a represented party. The district court suppressed the evidence, finding that the Assistant was aware that the defendant had retained counsel and that the informant was the Assistant's alter ego during the discussions with the defendant. The court of appeals considered the extent to which prosecutors could use informants prior to indictment, but after a suspect retained counsel in connection with the subject matter of a criminal investigation. The court concluded that under the disciplinary rule, "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization." *Hammad*, 858 F.2d at 839. However, the court viewed the issuance of the bogus subpoena as misconduct because it created a pretense to help the informant elicit admissions from a represented person. *Id.* at 840.

42. Thornburgh Memo, *supra* note 41. The Thornburgh Memo claimed that "local and state rules [may not be used] to frustrate the lawful operation of the federal government." *Id.*

43. Jerry Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203 (1991) (questioning whether government attorneys were being judged by lower ethical standards than other bar members).

44. Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290, 290 (1991).

45. *See Proposal to Amend Rule 4.2 is Taken Off ABA Calendar*, 10 A.B.A: THE BUREAU OF NAT'L AFF. INC., LAWS. MANUAL ON PROF. CONDUCT 161 (1994).

the critics of the Thornburgh memorandum.[46] Although Reno managed to publish a contacts rule in 1995 that purported to preempt state and local rules,[47] she failed to convince at least one circuit court of appeals that federal attorneys should be exempt from state-imposed standards.[48]

The Department's contacts rule was not the final answer to the question of who has ultimate disciplinary authority over federal prosecutors. Congress trumped the Department's effort to claim ultimate authority to prescribe ethics parameters for federal prosecutors by enacting the McDade Amendment, which went into effect in April 1999.[49] The McDade Amendment subjects government attorneys to state laws and rules as well as to local federal court rules governing attorney conduct and ethics.[50] The legislation, which does not specifically mention the contact rule, was widely believed to be both a response to the contact rule and an act of revenge on the part of Congressman McDade, who was acquitted of racketeering charges after a long-running investigation and prosecution.[51]

An overwhelming majority of Congress passed the McDade Amendment despite efforts by the Department of Justice to defeat the measure.[52] Critics of the legislation predicted that federal law

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46. Allen, *supra* note 40, at 200.

47. Communications with Represented Persons, 28 C.F.R. § 77.1(a) (1995).

48. United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998).

49. 28 U.S.C. § 530 (2000). Although courts generally regulate the conduct of attorneys, Congress has power through the Necessary and Proper Clause of the United States Constitution to regulate the practice of law. HAZARD & HODES, *supra* note 15, at 1-15.

50. The law provides that

> (a) An attorney for the government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State. (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section. (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

28 U.S.C. § 530B (2000).

51. ABA/BNA LAWS. MANUAL, *supra* note 2; Chitra Ravagan, *Federally Speaking, a Fine Kettle of Fish*, U.S. NEWS & WORLD REP. (Oct. 16, 2000).

52. *Id.*

enforcement would be adversely affected, particularly with respect to multijurisdictional investigations.[53] But dire as some of those predictions were, the Oregon situation proved to be worse.

III. THE PROBLEM IN OREGON

Only months after the McDade Amendment took effect, the Oregon Supreme Court reviewed a disciplinary action that involved an attorney in private practice, but raised questions concerning the application of the misrepresentation rule to all attorneys--private and government.[54] The court's conclusion that Oregon Disciplinary Rule 1-102(A)(3), prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation," provides no investigatory exception brought federal covert operations in Oregon to a virtual standstill. It took eighteen months, several proposed rule changes, and a federal lawsuit before the situation was finally resolved.

A. In re *Gatti*

SAIF Corporation[55] and the Oregon Department of Justice conducted an undercover investigation, called "Operation Clean Sweep," that resulted in racketeering and fraud charges against a number of defendants.[56] Daniel J. Gatti, an attorney licensed and practicing in Oregon, represented several chiropractors charged in the investigation. In 1992, Gatti lodged a complaint with the Oregon State Bar,[57] claiming that the lawyers involved in Operation Clean Sweep violated ethics rules when they advised SAIF investigators to assume false identities for purposes of obtaining information about

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53. *Id.*

54. *In re* Gatti, 8 P.3d 966, 976 (Or. 2000).

55. SAIF Corporation is a self-supporting, not-for-profit publicly owned workers' compensation insurance carrier with a five-member board of directors appointed by the governor. All funds in excess of expenses, claims, and required surplus are returned to eligible policy holders through dividends, rate reductions, and improved services. Benefit levels are established by the Oregon legislature. SAIF Company Profile, *at* http://www.saif.com/AbtSAIF/coprofl.htm (last visited Oct. 15, 2002).

56. *In re* Gatti, 8 P.3d 966 (Or. 2000).

57. The Oregon State Bar is charged with responsibility for investigating and prosecuting disciplinary actions against attorneys. OR. REV. STAT. § 9.490 (1999).

fraudulent workers' compensation claims.[58] One of the provisions that Gatti complained had been violated was the provision prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation."[59] In its response to Gatti, the Oregon Bar Association stated that "a prosecutor is required only to avoid the use of *illegal* means to obtain evidence directly or indirectly through others" and concluded that lawyers assisting SAIF were not acting unethically in providing advice on conducting a *legal* undercover operation.[60] The Oregon Bar submitted Gatti's complaint to the State Professional Responsibility Board,[61] which informed Gatti that "there was no evidence that any [SAIF or Department of Justice] attorney violated any provision of the Code of Professional Responsibility in connection with Operation Clean Sweep."[62]

Within a month of receiving the decision of the State Professional Responsibility Board to close the file on his complaint, Gatti learned from an acquaintance that a company called CMR (Comprehensive Medical Review)[63] might be using employees who were not

58. *In re* Gatti, 8 P.3d 966, 969 (Or. 2000).

59. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3).

60. *Gatti*, 8 P.3d at 969. The Bar's letter to Gatti stated:

> Because of the general nature of your allegations and the lack of any named respondent, the Bar was unable to follow its normal investigative process, which consists of forwarding a copy of the complaint to the responding lawyer and asking for a response to the specific allegations . . . . Our preliminary research focused on whether a governmental agency, and lawyers working for that agency, have more latitude in carrying out the agency's regulatory powers in a surreptitious fashion than members of the Bar in the private sector. The answer to that question is not clear; however, our research does suggest that a prosecutor is required only to avoid the use of *illegal* means to obtain evidence directly or indirectly through others. The cases we have reviewed seem to indicate that a prosecutor oversteps his bounds when he causes another to give false testimony under oath or to appear before a court or other agency who has not first been apprised of the deception and the reasons therefore. Our preliminary conclusion is that if SAIF is considered to have public authority to root out possible fraud, then attorneys assisting SAIF in this endeavor are not acting unethically in providing advice on how to conduct a *legal* undercover operation. It is our understanding that no court has found Operation Clean Sweep to have been illegal or to constitute prosecutorial misconduct.

Id.

61. Oregon has an integrated state bar and all licensed attorneys must be active members of the Oregon State Bar Association. OR. REV. STAT. § 9.180 (1999). State law sets out the procedures for investigation of complaints concerning attorneys. OR. REV. STAT. §§ 9.164, .527, .532 (1999).

62. *Gatti*, 8 P.3d at 969.

63. CMR was a California company that provided medical review reports to insurance companies concerning medical claims. *Gatti*, 8 P.3d at 970.

medically trained to prepare medical review reports.[64] Gatti's acquaintance also believed that CMR was using a formula designed to save costs for insurance companies. A few weeks later, Gatti was notified that the claim of one of his clients had been denied, and Gatti believed the denial was based on a report prepared by CMR. The denial angered Gatti, and he made three telephone calls: one to the doctor who signed the CMR report and two to employees of CMR. In two of the calls, Gatti represented himself as a chiropractor interested in working for CMR. Gatti taped both of those calls.

After the three telephone calls, Gatti planned a fraud investigation of CMR and, in June 1994, based on information other than that obtained in his original phone calls, Gatti filed a federal action against CMR and others for fraud and intentional interference with contractual relations. Shortly thereafter, the CMR employee to whom Gatti had misrepresented himself filed a complaint with the Bar concerning the phone call.

Disciplinary counsel for the Bar began an investigation of the CMR complaint against Gatti, eventually charging him with violation of DR 1-102(A)(3),[65] DR 7-102(A)(5),[66] and Oregon Revised Statutes 9.527(4).[67] Gatti responded that he was conducting a fraud investigation on behalf of various clients and the matter was in litigation; he later admitted some of his responses were "nasty" and "arrogant."[68] Gatti claimed that the 1992 letter from Bar counsel responding to Gatti's complaints about SAIF and Department of Justice lawyers led him to reasonably believe that undercover operations conducted by private lawyers do not violate the Code of

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64. *Id.* at 969-70.

65. DR 1-102(A)(3) provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Rule 8.4(c) of the Model Rules of Professional Conduct is the same. *See supra* note 3.

66. DR 7-102(A)(5) provides that, in the course of representing a client or the lawyer's own interests, "a lawyer shall not . . . knowingly make a false statement of law or fact."

67. OR. REV. STAT. § 9.527(4) provides that the Oregon "Supreme Court may disbar, suspend or reprimand a member of the bar whenever, upon proper proceedings for that purpose, it appears to the court that . . . the member is guilty of willful deceit or misconduct in the legal profession."

68. *In re* Gatti, 8 P.3d 966, 979 (Or. 2000). Following the court's decision to reprimand him, Gatti was quoted as saying, "Erin Brockovich got paid, and I get reprimanded." Michael Wilson, *High Court Rules on Lawyers and Lies*, THE OREGONIAN, SUNRISE EDITION, Aug. 18, 2000, at B10.

Professional Responsibility.[69] The trial panel of the State Professional Responsibility Board found that Gatti had committed the violations with which he was charged but dismissed the Bar's complaint. According to the trial panel, the Bar was estopped from prosecuting Gatti because of the 1992 letters concerning Operation Clean Sweep.[70]

The Bar appealed to the Oregon Supreme Court, which disagreed with the trial panel, finding that Gatti violated each of the rules and the statute.[71] Further, the court found that Gatti's reliance on the 1992 letter from disciplinary counsel was not reasonable and that "advice from disciplinary counsel is not a defense to a disciplinary violation."[72] Rejecting amendments proposed by Gatti[73] and others appearing as amici curiae,[74] the court refused to recognize an exception to the broad language of DR 1-102(A)(3).[75] Although it recognized that covert techniques may be useful to law enforcement investigations, the court found that the disciplinary rules and the Oregon statute applied to all members of the bar. The court concluded, after weighing all factors, that a public reprimand was the appropriate sanction for Gatti.[76]

The court's announcement that DR 1-102(A)(3) applied to all

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69. *Gatti*, 8 P.3d at 972.

70. *Id.* at 969, 972.

71. *Id.* at 973-74.

72. *Id.* at 972-73.

73. Gatti proposed that the court adopt the following language, "as long as misrepresentations are limited only to identity or purpose and [are] made solely for purposes of discovering information, there is no violation of the Code of Professional Responsibility." *Id.* at 974.

74. The United States Attorney for the District of Oregon proposed that the court "should 'not interpret DR 1-102(A)(3) in a manner that would determine that government attorneys who advise, conduct or supervise legitimate law enforcement activities that involve covert operations violate that disciplinary rule.'" *Gatti*, 8 P.3d at 975. The Oregon Consumer League, Fair Housing Counsel of Oregon, Oregon Law Center, and many individual lawyers suggested the following rule:

> Provided that the conduct does not violate any other provision of law or Disciplinary Rule, and notwithstanding DR 1-102, DR 7-102 and ORS [9.527(4)], a lawyer, personally or through an employee or agent, may misstate or fail to state his or her identity and/or purpose in contacting someone who is the subject of an investigation for the purpose of gathering facts before filing suit.

Id. (alteration in original).

75. The court stated, "any exception must await the full debate that is contemplated by the process for adopting and amending the Code of Professional Responsibility." *Gatti*, 8 P.3d at 976; *see also* OR. REV. STAT. § 9.490(1) (1999) (describing process for formulating rules of professional conduct).

76. *Gatti*, 8 P.3d at 980.

lawyers with no exception for law enforcement purposes addressed a question of first impression in Oregon and a question rarely considered in other jurisdictions. The broad exhortations of the misconduct rule had seldom been considered in the context of the realities and practicalities of law practice.[77] No other court or disciplinary body had ever reached the conclusion that the court in *Gatti* reached.

The *Gatti* decision brought covert law enforcement operations in Oregon to a stop. The Oregon Attorney General halted all undercover work by his lawyers and investigators, including sting operations conducted by the consumer fraud protection unit.[78] The United States Attorney for Oregon notified federal investigative agencies that her lawyers could no longer participate in covert operations because of the very real potential of disciplinary sanctions.[79]

B. The Oregon State Bar Responds

The Board of Governors of the Oregon State Bar appointed a study group to determine whether the disciplinary rules should be amended as a result of the *Gatti* decision.[80] A majority of the study group recommended that the disciplinary rule be amended to allow lawyers "to engage in covert activities to enforce laws and rights that cannot be as effectively enforced in another way."[81] The study group cited

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77. Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 473-74 (D.N.J. 1998) (finding that attorneys did not violate New Jersey disciplinary rule prohibiting misrepresentation by posing as consumers to determine whether a consent order was being violated); Alabama Bar Association Ethics Opinion RO-89-31 (1989) (stating that lawyer did not violate Alabama's disciplinary rule prohibiting material misrepresentations in having investigator lie about his identity in gathering evidence); *see also* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the* Model Rules of Professional Conduct, 8 GEO. J. LEGAL ETHICS 791, 794-95 (1995).

78. Mark Larabee, *Undercover Police Work in Jeopardy*, THE OREGONIAN, SUNRISE EDITION, Oct. 9, 2000, at A01.

79. *Id.*

80. Oregon State Bar, *Minutes of the Meeting of the Board of Governors*, at 1 (Sept. 21-22, 2000) *at* http:www.osbar.org/Governance/OSBBoard of Governors/Minutes/bm00Sep21.htm. Changes to Oregon State Bar disciplinary rules must be approved by the Oregon State Bar House of Delegates and then adopted by the Oregon Supreme Court. OR. REV. STAT. § 9.490(1) (1999).

81. The minority filed a report stating that a change of the rules was unnecessary, noting that "there has never been a disciplinary proceeding against a lawyer for advising a client to conduct lawful

the societal benefits of covert investigations, but was also motivated by the desire to forestall a more broadly drawn federal or state legislative response.[82]

The Oregon State Bar Board of Governors accepted the study group's recommendation and proposed to the Oregon Supreme Court an amendment that provided an exception to permit lawyers to supervise or advise about lawful covert activity in the investigation of violations of civil or criminal law.[83] On April 11, 2001, the Oregon Supreme Court refused to adopt the amendment, reportedly because the court found the amendment to be overly broad.[84]

C. The Department of Justice Takes Action

The Department of Justice declined to participate in legitimate law enforcement activities after the decision in *Gatti* because of the possibility of disciplinary sanctions against federal prosecutors.[85] After the Oregon Supreme Court declined to accept the first proposed amendment to the disciplinary rules, the Department decided to

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undercover activities." According to the minority report, the problem resulted from lawyers extending their role from advisors to undercover activity to "being a full participant in law enforcement activities." *See* Oregon State Bar, *2001 Special House of Delegates Meeting*, at 3 (Jan. 19, 2001) *at* http://www.osbar.org/Governance/OSB House of Delegates/2001/101 agenda.htm. The minority report does not address the portion of DR 1-102 that states "It is professional misconduct for a lawyer to (a) violate or attempt to violate the rules of professional conduct, *knowingly assist or induce another to do so, or do so through the acts of another* . . ." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102 (emphasis added). The minority also does not address the ethical dilemma of a licensed attorney employed as a law enforcement officer.

82. *See* Oregon State Bar, *2001 Special House of Delegates Meeting*, at 3 (Jan. 19, 2001) *at* http://www.osbar.org/Governance/OSB House of Delegates/2001/101 agenda.htm.

83. The amendment to DR 1-102 stated:

> Notwithstanding subsections (A)(1) and (A)(3) of this rule or DR 7-012(A)(5), it is not misconduct for a lawyer to supervise or advise about lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise consistent with these disciplinary rules.

Agenda, Oregon State Bar, 2001 Special House of Delegates Meeting (Sept. 22, 2001), *available at* http://www.osbar.org/4osb/leadership/hod/2001/901agenda.htm (last visited Oct. 15, 2002).

84. *Oregon's Top Court Rejects Plan by State Bar on Prosecutors' Role*, THE OREGONIAN, SUNRISE EDITION, at C05. A working group of justices of the Oregon Supreme Court recommended that the amendment not be adopted for four reasons: (1) the proposed amendment was too broad; (2) the amendment would permit a lawyer to accomplish indirectly what he could not do directly; (3) the proposed amendment only applied to DR 1-102(A)(3) and would therefore create interpretation problems because other disciplinary rules embody the honest conduct principle; and (4) "the amendment would nullify one of the most fundamental responsibilities of lawyers--honest conduct . . . ." Oregon Supreme Court, Minutes of Public Meeting, , at 2-3 (Apr. 11, 2001).

85. Larabee, *supra* note 78, at A01; *see also supra* note 79 and accompanying text.

regain control of its law enforcement functions in Oregon. On May 23, 2001, the United States of America sued the Oregon State Bar in an action for declaratory and injunctive relief.[86] Specifically, the Department of Justice asked the federal district court to declare that the Supremacy Clause of the United States Constitution barred the Oregon State Bar from enforcing disciplinary rules 1-102(A)(3) and 7-102(A)(5), claiming that enforcement of those disciplinary rules against federal attorneys prevented the federal attorneys from performing their duties.

The Oregon State Bar moved to dismiss the action on three grounds.[87] The first ground was failure to state a claim,[88] the Oregon Bar contending that the McDade Amendment[89] eroded the Department's argument of supremacy of federal law over Oregon ethics rules. Second, the Bar moved to dismiss for lack of subject matter jurisdiction,[90] stating that there was no case or controversy before the court since the Department failed to allege that any federal prosecutor was actually disciplined under the holding in *Gatti*. Finally, the Bar moved to dismiss for failure to join a necessary and indispensable party,[91] arguing that the ultimate power to adopt and enforce rules of professional conduct is vested in the Oregon Supreme Court.

D. The Oregon Resolution

In addition to the amendment that was rejected by the Oregon Supreme Court in April 2001[92] and the Department's federal

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86. United States v. Or. State Bar, CV01-6168-HO (D. Or. May 23, 2001).

87. *See* Defendant's Motion to Dismiss, United States v. Or. State Bar, CV01-6168-HO (D. Or. May 23, 2001) (motion filed July 9, 2001); Memorandum in Support of Defendant's Motion to Dismiss and Alternative Motions for Abstention and Certification of Questions, United States v. Or. State Bar, CV01-6168-HO (D. Or. May 23, 2001). The Oregon State Bar filed two other motions on that same day: one asking the court to abstain from making a decision and one asking the court to require the Department to describe precisely the conduct implicated by the disciplinary rules and certify a question to the Oregon Supreme Court asking whether the conduct offends the rules.

88. FED. R. CIV. P. 12(b)(6).

89. 28 U.S.C. § 530(B); *see also supra* note 1.

90. FED. R. CIV. P. 12(b)(1).

91. FED. R. CIV. P. 12(b)(7).

92. *See supra* note 83.

lawsuit,[93] the Oregon legislature considered legislative remedies.[94] After the terrorist attacks on September 11, 2001, the search for a solution intensified. The United States Congress considered and rejected several proposals to remedy the Oregon situation.[95]

On December 11, 2001, the Department of Justice and the Oregon

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93. *See supra* note 6.

94. The Oregon legislature amended Section 9.527 of the Oregon Revised Statutes

> to exempt advice on undercover law enforcement activities by assistant district attorneys and federal prosecutors working for a public body or the federal government from prosecution by the bar for willful deceit or misconduct under the statute. This solution however, fails to address the ethical ramifications lawyers will continue to face in light of the *Gatti* ruling.

Cliff Collins & Susan Evans Grabe, *Kumbaya at the Capitol*, 61 OR. ST. B. BULL. 9, 12 (2001). Section 9.527 sets forth grounds for discipline of attorneys. The Oregon Supreme Court is the final authority on adoption of disciplinary rules and on disciplinary actions. OR. REV. STAT. §§ 9.490, .527 (1999).

> Bar proceedings relating to discipline, admission and reinstatement are neither civil nor criminal in nature. They are sui generis and within the inherent power of the Supreme Court to control. The grounds for denying any applicant admission or reinstatement or for the discipline of attorneys set forth in ORS 9.005 to 9.755 are not intended to limit or alter the inherent power of the Supreme Court to deny any applicant admission or reinstatement to the bar or to discipline a member of the bar.

OR. REV. STAT. § 9.529. The Oregon Supreme Court has recognized that the separation of powers is not absolute. *See, e.g.*, U'Ren v. Bagley, 245 P. 1074, 1075 (Or. 1926). However, the court has also recognized that certain powers are exclusively reserved for the judiciary. Sadler v. Or. State Bar, 550 P.2d 1218, 1226 (Or. 1976).

> There are cases which hold that in the area of admission to the bar and suspension or disbarment, the judiciary has exclusive inherent power which in no way can be limited by the legislature. Courts may honor implementing legislation, but are not bound to do so . . . . Any statute which affects the court's rules on admission to the bar, suspension, or disbarment might well constitute a substantial impairment of the court's power.

Id; see *also* WOLFRAM, *supra* note 16, at 27.

> Regulation of the practice of law is part of the judicial function, as history shows. Therefore, at least in the radical statement of the doctrine [of negative inherent powers], *any* attempt by either the legislative or executive branch to entrench on that exclusively judicial power is an unconstitutional usurpation. That radical form of the negative inherent powers doctrine is followed by a large number, perhaps a majority, of American jurisdictions. Some courts are more restrained. They assert the less jealous doctrine that the courts will share the power to regulate lawyers with other branches of government so long as this poses no threat to the continued vitality of the judicial branch.

Id. (citing State *ex rel.* Robeson v. Or. State Bar, 632 P.2d 1255 (Or. 1981)).

95. Senator Orrin Hatch attempted to amend the McDade legislation even before the *Gatti* decision. Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999). Following the terrorist attacks on September 11, 2001, Senator Patrick Leahy introduced a bill to amend the McDade legislation. Professional Standards for Government Attorneys Act of 2001, S. 1437, 107th Cong. (2001). When Senator Leahy failed to get his provisions included in the antiterrorism legislation, an attempt was made to attach the Federal Investigation Enhancement Act of 2001, H.R. 2506, 107th Cong. (2001) to the Foreign Appropriations bill. None of the efforts to amend the McDade amendment were successful. *See* Elkan Abramowitz & Barr A. Bohrer, *In the Name of Counter-Terrorism*, 226 N.Y. L.J. 89 (2001).

State Bar reached a settlement agreement in the federal litigation.[96] The settlement was facilitated by the Oregon Supreme Court's expressed intention, announced on November 28, 2001, to amend the disciplinary rules to allow lawyers to supervise undercover activities.[97] The court made the announcement at the same time it rejected a second amendment proposed by the Oregon State Bar.[98] Fulfilling its announcement, on January 29, 2002, the Oregon Supreme Court adopted an amendment to DR 1-102 by adding the following subsection (D):

> Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity," as used in this rule, means an effort to obtain

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96. Stipulated Order of Dismissal, United States v. Or. State Bar, CV01-6168-HO (D. Or. May 23, 2001) (order dated Feb. 12, 2002).

97. Oregon Supreme Court, Minutes of Public Meeting, (Nov. 28, 2001).

98. The second proposed amendment, which was approved by the Oregon State Bar House of Delegates on September 22, 2001, was limited to actions of government attorneys. This amendment, rejected by the Oregon Supreme Court, stated:

> Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge carried out by publicly funded law enforcement agencies, including the federal and state departments of justice and district attorneys, and publicly funded civil rights enforcement agencies, including nonprofit organizations such as legal services offices and fair housing entities and any other lawyer acting in the role of private attorney general. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Memorandum from Karen L. Garst, Executive Director, Oregon State Bar, to Oregon State Bar House of Delegates Members (Dec. 11, 2002) *at* http://www.osbar.org/Governance/OSB HouseOfDelegates/2002/memo Dec 01.html.. Oregon Supreme Court Justice Michael Gillette proposed broadening the rule to cover all attorneys, saying, "If there's a need for subterfuge at all, it spreads all the way across the range of possible litigation, and so I wanted to make the rule broader and if the board of bar governors accepts this amendment it will be broader." *Oregon Considered*, Oregon Public Broadcasting, (Nov. 28, 2001) (transcript on file with *Georgia State University Law Review*).

> information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.[99]

Ironically, the amendment that was finally adopted was almost identical to the one originally proposed by the Bar and rejected by the court.[100]

The resolution of the problem in Oregon was welcomed,[101] but arrived only after a great cost to law enforcement and the public. Almost eighteen months passed between the time of the *Gatti* decision and the adoption of the amendment on January 29, 2002. During that time, covert law enforcement operations in Oregon were either curtailed or operating without the critically important input of prosecutors. Moreover, since the Department of Justice's claim was grounded in the Supremacy Clause,[102] the Department was fortunate to have the issue favorably resolved before the district court was forced to rule on the lawsuit. The Department's reliance on the Supremacy Clause in earlier disputes concerning the application of ethics rules to federal prosecutors was not misplaced,[103] but the clear

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99. *Matter of an Amendment*, *supra* note 12.

100. *See supra* note 83.

101. The president of the Oregon Bar was quoted as saying, "I think this definitely closes a chapter in Bar history that needed closing." Ashbel S. Green, *Lawyers' No-Lying Dispute Comes to a Close*, PORTLAND OREGONIAN, Jan. 30, 2002, at C01.

102 . "This action is brought pursuant to the Supremacy Clause of the United States Constitution, Article VI, Clause 2, by which federal officers are immune from state control for the performance of federal duties consistent with federal law." Complaint for Declaratory and Injunctive Relief at 1-2, United States v. Or. State Bar, No. CV01-6168-HO (D. Or. May 23, 2001). The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

103. *See* Thornburgh, *supra* note 44. Thornburgh admits relying on the Supremacy Clause when he issued the "Thornburgh Memorandum," but denies that it was the "principal or only arrow in our quiver." *Id.* at 291.

application of the McDade Amendment to the Oregon situation left the United States' argument weak.[104] Most cases concerning the Supremacy Clause raise questions of interpreting congressional intent to preempt or not to preempt a particular field, and arise in situations where both the federal and state governments are attempting to regulate a particular field.[105] The McDade legislation, however, is not an attempt by Congress to regulate the conduct of attorneys. Congress clearly intended to concede authority to discipline federal attorneys to the states and prevent the Department of Justice from preempting state authority.[106]

IV. THE ROLE OF COVERT INVESTIGATIONS IN LAW ENFORCEMENT

The interruption of "business as usual" in Oregon halted ongoing covert investigations and delayed or destroyed the initiation of new ones.[107] While some law enforcement officials claimed that the *Gatti* ruling had no effect on the conduct of their business,[108] most complained that the decision was crippling their law enforcement efforts.[109] Understanding the history and role of covert investigations in law enforcement is essential to understanding the ramifications of the *Gatti* ruling and appreciating the need to ensure that such a situation does not recur.

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104. The Department of Justice conceded in an earlier case that, because of the McDade Amendment, the Supremacy Clause was not violated by application of a state ethics rule to federal prosecutors. "Accordingly, as the parties recognize in their supplemental briefs, the question of whether Rule 3.8 violates the Supremacy Clause now turns on whether the rule is a rule of professional ethics, clearly covered by the McDade Act, or a substantive or procedural rule that is inconsistent with federal law." United States v. Colo. Supreme Court, 189 F.3d 1281, 1284 (10th Cir. 1999).

105. *E.g.*, Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (finding that Pennsylvania's Sedition Act was preempted by federal legislation); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (finding that Pennsylvania's Alien Registration Act of 1939 was preempted by the Federal Alien Registration Act of 1940). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 347-66 (6th ed. 2000) (explaining the basis for and workings of federal preemption).

106. *See supra* note 1.

107. *See supra* notes 78-79.

108. A Portland Police Bureau officer said, "We know the law .... We know how to run an undercover operation without having to ask for advice. They won't give it to us, and we don't ask." Larabee, *supra* note 78, at A01

109. Jeff Adler, *Ruling in Oregon Halts Federal Undercover Probes*, WASH. POST, (Aug. 9, 2001) available at http://www.crimelynx.com/oreuc.html; Peter Farrell, *Oregon's Top Court Rejects Plan by State Bar on Prosecutor's Role; A District Attorney Says the Decision Puts Undercover Investigations in an Almost Impossible Position*, THE OREGONIAN, SUNRISE EDITION, Apr. 12, 2001, at C05.

A. The History of Undercover Investigations in the United States

Early Americans were not disposed to create national police agencies like those in Europe.[110] Police agencies in the United States were originally organized by local units of government as non-uniformed divisions that responded to the needs of citizens but did not necessarily detect crime.[111] Growing crime problems in large cities were the impetus for developing investigative sections in police departments in the nineteenth century.[112]

There were few federal criminal laws and virtually no federal police agencies prior to the Civil War.[113] Private entrepreneurs responded to the needs for detective work of large industrial interests and victims of crime.[114] Undercover techniques were successfully employed by private detectives in various ways.[115]

The United States Post Office created an inspector's office in 1836 that primarily relied on private detectives for detective work, including undercover investigations.[116] The first significant federal

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110. ROBERT M. FOGELSON, BIG CITY POLICE 13-15 (1977).

111. GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 23 (1988); *see also* FRANK THOMAS MORN, THE EYE THAT NEVER SLEEPS: A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY, 1850-1920 at 113-44 (1988).

112. MARX, *supra* note 111, at 23-25; *see also* THOMAS A. REPPETTO, THE BLUE PARADE 52 (1978) ("[T]he New York detectives had begun as a small adjunct unit to the patrol force, and as late as 1863 they constituted only one percent of the department.").

113. MARX, *supra* note 111, at 27. In the mid-nineteenth century, there was no national detective agency and only Texas had a state-wide police force. Frank Thomas Morn, *Allan Pinkerton: Private Police Influence on Police Development*, *in* PIONEERS IN POLICING 96, 98 (Patterson Smith Publ'g Corp. 1977).

114. Morn, *supra* note 113, at 96. Allan Pinkerton formed the first private police organization in 1855 when he was hired for $10,000 to establish a railroad police for six midwestern railroads. *Id.* at 96.

115. MARX, *supra* note 111, at 27-29. Pinkerton detectives' surreptitious surveillance of a railroad conductor who was pocketing ticket money led to a successful prosecution in 1855. A Pinkerton agent successfully infiltrated a group of miners believed to be responsible for attacks on mine owners. Morn, *supra* note 113, at 101-02.

116. MARX, *supra* note 111, at 28.

> A major problem for the post office, before the registered mail system was developed, was the theft of mail containing valuables. In a case that a newspaper called the "most important arrest in the annals of Post Office depredations ever brought to light," Pinkerton arrested two postal employees (relatives of the Chicago postmaster at that) for mail theft. Pinkerton's tactic consisted of mailing and then secretly monitoring the passage of decoy letters and packages of the kind reported stolen.

Id. (footnote omitted).

police force, the Secret Service, was formed in 1865 by the Department of Treasury to respond to problems of counterfeiting and fraudulent war bounty claims.[117] The need for a federal law enforcement presence in the South following the Civil War stimulated the growth of federal law enforcement agencies.[118] In the early twentieth century, federal legislation to control distribution of narcotics[119] and prohibition[120] also increased federal law enforcement agencies.[121]

The undercover investigative techniques employed by private detectives were also used by federal law enforcement agents. State courts considered legal issues resulting from the use of undercover investigations for several years before the United States Supreme Court addressed an undercover issue.[122] The first case to reach the United States Supreme Court concerning an undercover investigation involved a postal inspector who, using a fictitious name, attempted to obtain contraband pornographic materials in a letter deposited in the United States mail.[123] In response to the inspector's undercover inquiry about "fancy photographs," the defendant wrote a letter saying that he had "200 negatives of actresses" and listed the prices for the photographs.[124] These letters, fruits of the covert investigation, were introduced into evidence at trial. The United States Supreme Court demonstrated approval of the covert

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117. *Id.* at 28.

118. *Id.* at 29-30.

119. The Harrison Act, ch. 1, 38 Stat. 785 (1914).

120. U.S. CONST. amend. XVIII (repealed 1933).

121. MARX, *supra* note 111; *see also* SANFORD J. UNGER, FBI (1975). The Justice Department received a $50,000 appropriation in 1871 for detection and prosecution of crime. The Justice Department employed no law enforcement agents but used the money to hire private detectives and also borrowed agents from other federal departments. It was not until 1906 that a separate force was organized in the Justice Department that eventually evolved into the FBI. *Id.* at 39-40. The FBI was expanded to enforce the 1910 Mann Act. Additional responsibilities necessitated by World War I also resulted in increased manpower for the FBI. *Id.* at 40-42.

122. *See, e.g.*, Kansas v. Jansen, 22 Kan. 498 (1879) (considering whether a defendant is guilty of a crime committed jointly with a cooperating witness or detective); People v. Noelke, 94 N.Y. 137 (1883) (finding that a prosecution witness who purchased a lottery ticket for the purpose of establishing illegal gambling was not an accomplice to the crime); Pigg v. State, 43 Tex. 108 (1875) (stating that the owner of a stolen horse did not consent to the theft because he hired a detective to gain the confidence of the thieves and participate in the plan).

123. Grimm v. United States, 156 U.S. 604, 606-07 (1895).

124. *Id.*

investigation by affirming the defendant's conviction.[125] Since that decision, and for more than one hundred years, the United States Supreme Court has reviewed criminal convictions obtained through the use of covert investigative techniques. The Court has not always approved the specific actions taken by government agents,[126] but the Court has consistently upheld the government's use of covert law enforcement techniques against a variety of constitutional challenges.[127] The precise role of prosecutors in the undercover investigations in the reported cases is not always clear. However, it is obvious from the facts in some cases that the prosecutor participated in the planning and execution of the operation.[128]

B. The Importance of Undercover Investigations to Law Enforcement

Undercover law enforcement techniques have long been recognized as necessary to effective law enforcement.[129] In fact, consensual crimes such as drug trafficking, bribery, and extortion would likely never be detected without the use of undercover methods. The parties to consensual criminal acts share an interest in maintaining privacy. Therefore, "[t]he initiative of enforcement cannot be left to private complaint."[130] Even when one of the parties

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125. *Id.* at 611.

126. *See e.g.*, Jacobson v. United States, 503 U.S. 540, 553 (1992) (reversing defendant's conviction for possession of pornographic materials because "[r]ational jurors could not say beyond a reasonable doubt that [the defendant] possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to [him].").

127. *Id.* at 548 ("Likewise there can be no dispute that the Government may use undercover agents to enforce the law."); *see also* Weatherford v. Bursey, 429 U.S. 545, 557-58 (1978) (finding no violation of a criminal defendant's civil rights where an undercover agent attended two pretrial meetings with a defendant and his lawyer to preserve the agent's cover); Hampton v. United States, 425 U.S. 484 (1976) (upholding the conviction of a defendant for selling heroin, which had been provided to the defendant by the government's confidential informant); United States v. Russell, 411 U.S. 423, 424-25 (1973) (upholding conviction when an undercover agent supplied the necessary ingredient for the manufacture of a controlled substance).

128. *See* United States v. Martino, 825 F.2d 754 (3d Cir. 1987) (finding there was no prosecutorial misconduct when prosecutor issued a sham grand jury subpoena to an undercover agent to protect an ongoing investigation); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (upholding conviction where federal agents and prosecutors participated in undercover operation prosecuting phantom cases and offering bribes to state court judges).

129. Ileana N. Saros, *The Undercover Operation: Indispensable Tool of Law Enforcement*, CRIM. JUST. Q. 27 (Fall 1985).

130. *Id.* at 29; see also Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and*

involved in a consensual crime agrees to give evidence, convictions against the other parties may be difficult to obtain if a co-conspirator's uncorroborated statements constitute the bulk of the evidence. In the absence of complaints from victims of crimes, detection and prosecution are only possible through government initiative.

The secretive nature of undercover law enforcement makes it difficult to quantify the impact of undercover methods. Nevertheless, on the federal level, major undercover operations[131] and certain undercover techniques[132] require authorizations, approvals, and reports that leave a statistical and anecdotal paper trail, offering some insight into the significance of undercover techniques.

Wiretapping offers perhaps the best example because of the reporting requirements mandated by federal law. Most wiretap applications are either supported by evidence gathered through undercover investigations or are authorized because undercover investigations have failed.[133] Although federal law prohibits private citizens from using certain types of electronic surveillance,[134]

Agent Provocateurs, YALE L.J. 1091, 1113 (1951).

131. Some undercover operations conducted by the FBI may be approved by the Special Agent in charge of a field office. However, investigations that require substantial monetary obligations, that are expected to last more than one year, and involving sensitive circumstances (such as investigations of public officials, political candidates, or foreign officials) must be approved by FBI Headquarters. *The Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations*, *available at* http://www.usdoj.gov/olp/fbiundercover.pdf (May 30, 2002).

132. Section 2519(3) of Title 18 of the United States Code requires the Administrative Office of the Courts to transmit a report to Congress with information about the number of wiretap orders and other relevant information. 18 U.S.C. § 2519(3)(2000).

133. An application for a wiretap order must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c) (2000). *See, e.g.*, United States v. Castillo-Garcia, 117 F.3d 1179, 1189 (10th Cir. 1997), *cert denied*, 522 U.S. 974 (1997) (noting that the government's attempt to discover suppliers through confidential informers had failed); United States v. Khan, 993 F.2d 1368, 1375 (9th Cir. 1993) (using confidential informant's investigations, but wiretap order was necessary because informants were afraid to testify); United States v. Wagner, 989 F.2d 69, 74 (2d. Cir. 1993) (using wiretap where confidential informant was unable to determine source of drug supply); United States v. David, 940 F.2d 722, 729 (1st Cir. 1991) (finding wiretap appropriate where undercover agents were unable to determine identity of suspected drug dealer's customers and suppliers); United States v. Commito, 918 F. 2d 95, 98 (9th Cir. 1990) (finding wiretap appropriate where undercover operations proved to be relatively unproductive); United States v. Ashley, 876 F.2d 1069, 1072 (1st Cir. 1989) ("Prior to granting authorization for a wiretap, the issuing court 'must satisfy itself that the government has used normal techniques but it has encountered difficulties in penetrating a criminal enterprise' . . . .").

134. The intentional interception of oral, wire, or electronic communications, except as authorized by

Congress recognized the value of wiretapping as a law enforcement tool. "Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."[135] By enacting the federal wiretapping statutes, Congress preempted state law and required state wiretap laws to be at least as restrictive as federal law.[136]

A federal prosecutor who seeks to intercept a wire, oral, or electronic communication[137] must first seek approval for the application through the Department of Justice.[138] The Department's policy requires the investigative officer to submit an affidavit setting forth the facts of the investigation.[139] The factual basis for the wiretap application often includes information garnered from undercover operations.[140] Other requirements include an application of a United States Attorney that "provides the basis for the court's jurisdiction" and a set of orders to be presented to the court.[141] If the

law, is a violation of federal law. 18 U.S.C. § 2511.

135. Pub. L. No. 90-315, § 801(c), 82 Stat. 211 (congressional findings) (codified at 18 U.S.C. § 2510).

136. 18 U.S.C. § 2515 (2000). In 2000, the federal government, District of Columbia, Virgin Islands, and 42 states had laws authorizing courts to issue wiretapping orders. Administrative Office of the United States Courts, *Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications*, at 7, http://www.uscourts.gov/wiretap00/2000wttxt.pdf (Apr. 2001) [hereinafter *Applications for Orders*].

137. Interceptions conducted with the knowledge and consent of one of the parties are discussed at *infra* note 153 and accompanying text.

138. 18 U.S.C. § 2516(1) (2000). Only certain high-ranking members of the Attorney General's staff are authorized to approve wiretap applications. The Electronic Communications Privacy Act of 1986 permits *any* government attorney to apply for a court order to intercept electronic communications. However, the Department permits a United States Attorney to apply for court authorization to intercept digital-display paging devices without the Department approval process. Interception of other types of electronic communications still requires the approval process described in this article according to Department directives. U.S. DEP'T. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-7.100 (1997) [hereinafter U.S. ATT'YS MANUAL].

139. 18 U.S.C. § 2518(1)(b) (2000).

140. United States v. Smith, 31 F.3d 1294, 1298 (4th Cir. 1994), *cert. denied*, 513 U.S. 1181 (1994) (involving an affidavit for wiretap that included information concerning use of confidential informants by police); United States v. Commito, 918 F.2d 95, 98 (9th Cir. 1990), *cert. denied*, 502 U.S. 879 (1990) (involving an undercover operation that spanned ten months before the wiretap application). The statute also requires a statement "as to whether or not other investigative procedures have been tried and failed." 18 U.S.C. § 2518(1)(c) (2000). Therefore, many wiretap applications represent the failure of an undercover operation to produce the desired results.

141. *See* U.S. ATT'YS MANUAL, *supra* note 138, § 9-7.110. The required contents of the wiretap application are described in 18 U.S.C. § 2518(1).

Department of Justice approves the application, the federal prosecutor must obtain the approval of a federal district court judge before the wire tap can be installed.[142] The requirements for monitoring and reporting on the wiretap are strict.[143]

Federal prosecutors are heavily involved in every step of wiretap interceptions. They prepare the initial application to the Department, prepare the pleadings for the federal district court judge, present the application to the judge,[144] prepare progress reports for the court,[145] and prepare notices to people whose communications were intercepted after the wiretap order terminates.[146] Finally, but most significantly, the prosecutor is inextricably involved in sifting the evidence obtained in the wiretap so that it can be used as evidence. Congress clearly anticipated and required the involvement of Department of Justice attorneys and state prosecutors in every step of a wiretap, which is an inherently deceitful law enforcement technique.

Federal law mandates reports of wiretap activity,[147] and those reports provide some insight into the significance of wiretap activities to law enforcement efforts. In 2000, wiretaps were authorized in 479 federal investigations and 711 state investigations.[148] During the same year, court-authorized wiretaps led to 3,411 arrests and 736 convictions.[149] Drug offenses counted for the greatest number of wiretaps, followed by racketeering, gambling, homicide and assault,

142. 18 U.S.C. § 2516 (2000).

143. For example, a wiretap must be monitored so as to minimize interception of communications that are not the target of the wiretap. 18. U.S.C. § 2518(5) (2000). The judge issuing the wiretap order may require progress reports. 18 U.S.C. § 2518(6). Intercepted communications must be recorded, if possible. 18 U.S.C. § 2518(8)(a). The recordings must be made available to the judge and sealed under his directions when the wiretap order expires. 18 U.S.C. § 2518(8)(a). Recordings of intercepted communications must be kept for a minimum of ten years and may only be destroyed with the court's permission. 18 U.S.C. § 2518(8)(a).

144. A judge may require the presentation of testimony in addition to the evidence presented in affidavit form. 18 U.S.C. § 2518(2).

145. *Id.* § 2518(6).

146. *Id.* § 2518(8)-(9).

147. *Id.* § 2519(3) (2000); *see also supra* note 132 and accompanying text.

148. *Applications for Orders*, *supra* note 136, at 15 (tbl. 2).

149. *Id.* at 36, tbl. 9. "Many wiretap orders are related to large-scale criminal investigations that cross county and state boundaries. Consequently, arrests, trials, and convictions resulting from these interceptions often do not occur within the same year as the installation of the intercept device." *Id.* at 6-7.

kidnapping, extortion, larceny and theft, and bribery.[150] The importance of electronic surveillance in the enforcement of laws is noted by prosecutors in those reports.[151] For example, a district attorney in California, reporting on the use of a wiretap in a drug investigation, said: "[w]ithout the wiretap, the head of this distribution organization and his chief co-conspirators would not have been convicted. Conventional investigative techniques would have only resulted in the conviction of the organization's 'mules.'"[152]

Many other kinds of law enforcement techniques are used in undercover operations, but information like that contained in the wiretap reports is not available. For example, federal law does not prohibit the interception of communications when one of the parties to the communications consents to the interception.[153] Federal law enforcement officers are required to obtain the approval of a United States Attorney to make a consensual recording where a body transmitter or recorder, or a fixed location transmitter or recorder, is used during a face-to-face meeting.[154] No report must be made to the Administrative Office of the Courts for consensual monitoring of any kind.

Numerous lesser practices in law enforcement involve elements of deception: license tags for automobiles assigned to officers who work undercover are registered in fictitious names; undercover officers are assigned identification materials in false names; and pretense telephone calls and other contacts are made for purposes of obtaining information. The courts have long recognized that undercover operations, and the deceptive techniques and practices that are part of them, are necessary components of law enforcement.[155] The guidance of legal advisers during investigations and the prosecution of cases resulting from covert operations have also been given at least the tacit approval of the courts.[156]

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150. *Id.* at 18-20.
151. 18 U.S.C. § 2519(2) (2000).
152. *Applications for Orders*, *supra* note 136, at 12.
153. 18 U.S.C. § 2511(2)(c).
154. U.S. ATT'YS MANUAL, *supra* note 138, § 9-7.301.
155. *See supra* notes 123-25.
156. *See supra* note 126.

As is evident from the foregoing, the participation of prosecutors in designing and implementing undercover operations is critical. On the federal level, it is not possible to comply with federal law[157] or the internal directives of the Department of Justice[158] without the participation of prosecutors. Consequently, if federal prosecutors are prohibited from involvement in covert operations, the operations will not occur or will be halted as in the aftermath of *Gatti* when hundreds of federal criminal investigations were curtailed.[159]

CONCLUSION: MCDADE SHOULD BE REPEALED AND SPECIAL DISCIPLINARY RULES FOR FEDERAL PROSECUTORS SHOULD BE ADOPTED

The problems created by the Oregon Supreme Court's wooden application of DR 1-102(A)(3) were finally resolved through adoption of an investigatory exception. However, every jurisdiction

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157. *See supra* note 141. An authorization for a wiretap order requires the preparation of an application, an order, and periodic reports to the court, all of which are functions of the prosecutor. 18 U.S.C. § 2518 (2000).

158. Approval to use a person in the custody of the Federal Bureau of Prisons or the United States Marshal's Service in an investigation must be sought and endorsed by the United States Attorney. U.S. ATT'YS MANUAL, *supra* note 132, § 9-21.050. Consensual monitoring (where one of the parties to the communication consents to its interception) must be approved by the United States Attorney or an Assistant. *Id.* § 9-7.302(III)(A)(8).

159. *See* Declaration of United States Attorney Michael W. Mosman in Support of the Plaintiff's Motion for Summary Judgment, United States v. Or. State Bar, No. CV01-6168-HO (D. Or. May 23, 2001).

> Until the issuance of the *Gatti* decision, prosecutors worked closely with federal law enforcement officers, as well as state and local police, during undercover criminal investigations. Following the *Gatti* decision and continuing to the present, however, the United States Attorney's Office ceased providing advice and direction with respect to undercover investigations to avoid running afoul of DR 1-102 and DR 7-102 as interpreted in *In re Gatti* . . . . [W]e have ended our involvement in some undercover investigations formerly overseen by attorneys in our office. Almost without exception we have declined to move forward with organized Crime Drug Enforcement Task Force proposals involving undercover work. This office has declined to review or approve search warrants and arrest warrants when undercover or covert investigations are underway. [Assistant U.S. Attorneys] have been limited in their ability to obtain approval of applications for wiretaps in the District of Oregon that involve undercover activity . . . . We have also placed a number of investigations on "hold" that involve undercover work pending a change in the Disciplinary Rules that would allow the [Assistant U.S. Attorneys] in this office to advise and supervise agents who were involved in covert operations.

Id.

has an identical rule,[160] but no other jurisdiction has an investigatory exception. The possibility exists that other jurisdictions could interpret their rules like the court in *Gatti*. Even if no other court reaches the same conclusion that the Oregon court reached, federal prosecutors could be forced to spend time and money defending themselves in disciplinary proceedings.[161]

Some participants in the Oregon debate felt that prosecutors could avoid violating the misconduct rule by limiting their participation in undercover operations.[162] However, that approach is untenable because discouraging or prohibiting attorneys from participating in undercover operations by threatening ethical sanctions is contrary to the exclusionary rule, which is premised on the notion that excluding illegally obtained evidence will reform law enforcement behavior.[163] If law enforcement officers want successful prosecutions, they will obey the law to preserve the admissibility of evidence. To the extent that the philosophy of the exclusionary rule is valid, it encourages law enforcement to consult with prosecutors to ensure that evidence is gathered in compliance with the law so that later problems of admissibility are avoided. Furthermore, it is surely indisputable that prosecutors who are actively supervising investigations are in a position to apply the legal brakes to the actions of overly zealous law enforcement agents thereby safeguarding constitutional rights.

Even if law enforcement agencies conducted undercover operations without the benefit of advice from prosecutors, the ethical dilemma for prosecutors would remain. Model Rule of Professional

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160. California is the exception. *See* WOLFRAM, *supra* note 16, at 56-57.

161. In response to a request from a federal government attorney, the Utah State Bar issued an advisory opinion that participation of a government lawyer in a lawful covert government operation does not violate Utah's misconduct rule. Utah State Bar, Ethics Advisory Op., No. 02-05 (Mar. 18, 2002).

162. "The concern expressed in response to *Gatti* arises in some part because many lawyers have extended their involvement beyond being an advisor to being a full participant in law enforcement activities." Oregon State Bar, *supra* note 78, at 15 (Nov. 9, 2000). "Some argued that prosecutors have increasingly become active participants, rather than advisers, in covert police investigations and should re-examine their roles." Michelle Roberts, *Lawyers Loosen Bar Rule on Ethics*, THE OREGONIAN, SUNRISE EDITION, Jan. 20, 2001, at C01.

163. "[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" Mapp v. Ohio, 367 U.S. 643, 656 (1961) (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

Conduct 8.4(a) states: "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[164] It takes little imagination to fashion an argument that, by simply prosecuting cases that use evidence from undercover investigations, a prosecutor induces a law enforcement agency to conduct operations involving deceit and misrepresentation.

The McDade Amendment was hailed as legislation that held federal prosecutors to the same ethical standards as other attorneys. But federal prosecutors have obligations and responsibilities that differ from those of private practitioners and even from other government attorneys. The disciplinary rules fail to take those differences into consideration. The McDade Amendment, by placing disciplinary responsibility for federal prosecutors completely in the authority of the various states, leaves the federal government unable to respond to the needs of law enforcement and to national emergencies. Just as the *Gatti* ruling came as a great surprise to many,[165] there could be other unpleasant surprises as Oregon and other states consider similar disciplinary actions.[166] The most direct

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164. MODEL RULES OF PROF'L CONDUCT R. 8.4(a). Disciplinary Rule 1-102(A) is similar. It provides that "a lawyer shall not (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A).

165. The President of the American Bar Association, William H. Jeffress, Jr., wrote a letter to United States Senator Strom Thurmond, Chairman of the Subcommittee on Criminal Justice Oversight of the Committee on the Judiciary, expressing the views of the ABA on the McDade Amendment. The letter was sent four months before the Oregon Supreme Court handed down the *Gatti* decision and was, in part, a response to the testimony of Deputy Attorney General Eric Holder. The letter said:

> Mr. Holder pointed out in his testimony that the Oregon rule prohibiting deception by lawyers . . . has been interpreted to prohibit government attorneys' participation in "sting" operations. *In re Gatti* No. 95-18 (Oregon 1998). The opinion referred to, however, was issued by a three-lawyer trial panel in an unusual setting involving a private practitioner, where the "law enforcement exception" to the rule was not briefed by the Bar, and the decision is currently on appeal to the Oregon Supreme Court. The ABA does not agree that mere supervision of undercover investigations by government lawyers violates the Model Rules, and we would be surprised to find that any court of last resort would so hold.

Letter from William H. Jeffress, Jr., President, ABA, to Senator Strom Thurmaond (Mar. 31, 1999), *at* http"//abanet.org/legadv/congletters/106th/ef33199.html.

166. Some legal scholars predicted that federal prosecutors would encounter problems with the McDade legislation such as enforcement of state ethics rules against compensating fact witnesses so as to preclude promises of leniency for cooperating witnesses or using state ethics rules to prohibit federal prosecutors from surreptitiously recording conversations. ABA/BNA LAWS. MANUAL, *supra* note 2.

and effective way to avoid problems like *Gatti* in other jurisdictions is to repeal the McDade Amendment. As *Gatti* so clearly demonstrates, subjecting federal prosecutors to the application of vaguely written disciplinary rules can cause unanticipated results and real problems for federal law enforcement. Federal prosecutors should be subject to disciplinary rules and should conform to high standards of conduct, but the interests of law enforcement should not be punished in the process.

Simply repealing the McDade Amendment would be an incomplete solution because it would leave unanswered the question of who disciplines federal prosecutors. A satisfactory solution would include disciplinary rules and procedures specifically applicable to federal prosecutors. Since the disciplinary rules of the various states were drafted with little, if any, consideration for the special functions of federal prosecutors, the interests of all would be better served if disciplinary rules for federal prosecutors were drafted in contemplation of their responsibilities. The Department of Justice, if permitted to use its statutory rulemaking authority,[167] could and should create rules governing the conduct of federal prosecutors. Through its rulemaking authority, the Department could provide opportunities for input and comments. The Department of Justice could be the first to review complaints lodged against federal prosecutors, with final review of both findings and sanctions by an independent board authorized by Congress.

The advantages of repealing McDade and establishing a single disciplinary authority for federal prosecutors are clear. Failure to reach a satisfactory resolution of this problem will result in incalculable costs to federal law enforcement.

167. 5 U.S.C. § 301 (2000).